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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 951.

THE UNITED STATES, Appellant,

v.

JOHN T. PATTERSON.

BRIEF FOR APPELLEE.

GEORGE A. KING,
Attorney for Appellee.

H. L. McQUEEN, PRINTER.

claimed for each phase of the act. In the Tanner case the act of transporting criminals involved the delivery of a warrant of commitment, and, not satisfied with the pay allowed for such transportation, the marshal claimed compensation for the other phase of his act, the delivery of the warrant, regarding this, by a strained construction of the statute, as a serving of process.

So here, the appellee is not content with his fees for swearing the complainant and his witnesses, drawing the complaint, and issuing the warrant, but looking at his act, already fully compensated for, from another point of view, he claims that it is a "hearing and deciding on criminal charges," and that he should have additional compensation for it when viewed in that aspect. The decision in *United States* v. *Tanner* is, by parity of reasoning, fatal to this claim.

The appellant therefore submits that the judgment of the Court of Claims should be reversed.

CHARLES C. BINNEY,
Assistant Attorney,
J. E. DOLGE,
Assistant Attorney-General,
For Appellant.

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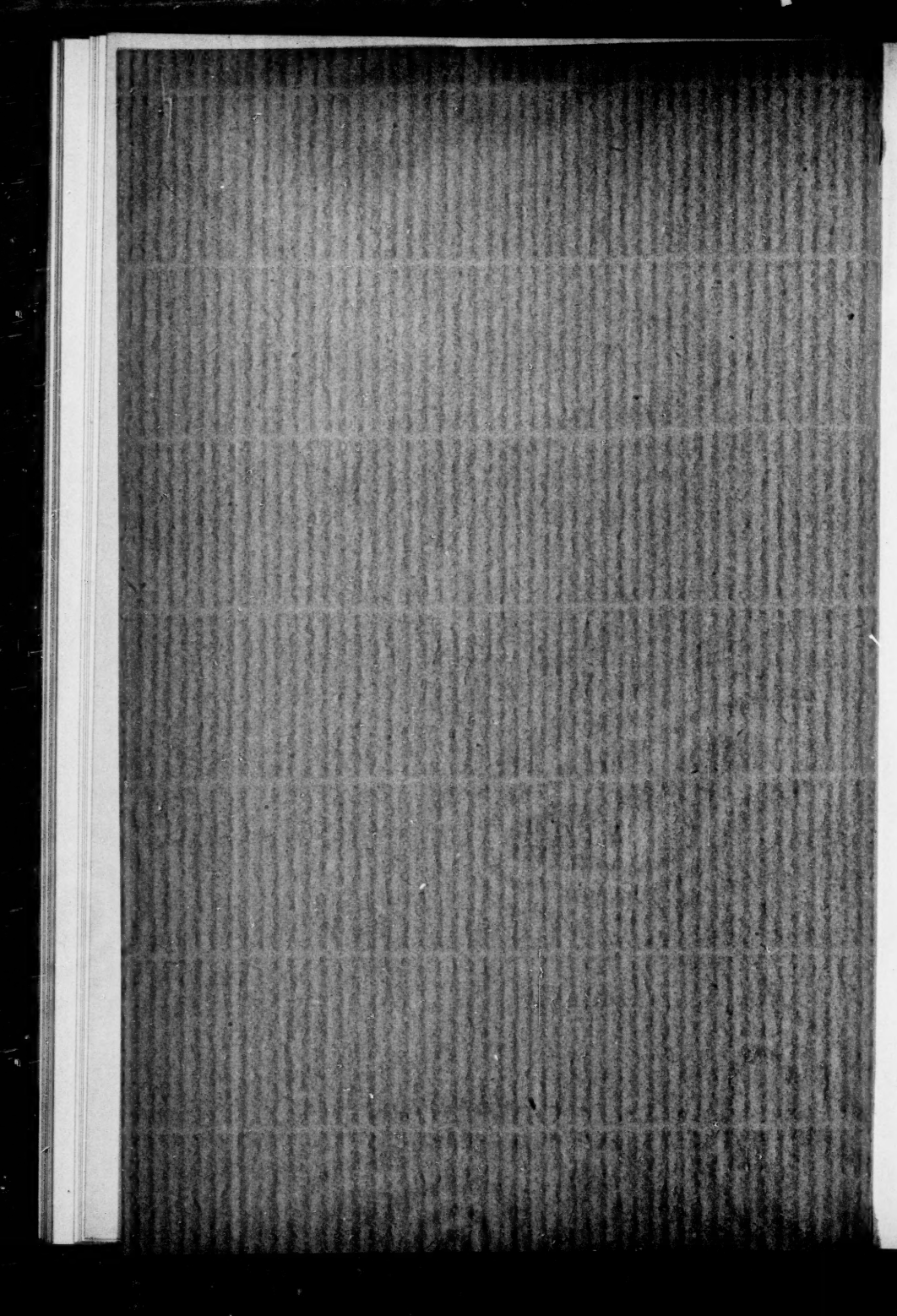

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1. Statement of the Case.

The claimant, John T. Patterson, has been a Commissioner of the Circuit Court of the United States for the Western District of North Carolina since the 6th day of July, 1875 (Record, p. 2, Finding I).

As such commissioner he performed certain official services for the defendants from the 20th day of July, 1886, to the 14th day of March, 1892, consisting of hearing charges made by complaining witnesses against persons charged with violations of the laws of the United States, and holding examinations of such complaining witnesses, and any other witnesses produced by them in support of their allegation, and deciding whether a warrant should not issue upon the complaint made (p. 2, Finding II).

For such services complainant prepared his account and presented the same through and in the presence of

the United States district attorney for the said Western District of North Carolina to the Circuit Court of the United States for the said district for approval, and an order was thereupon entered approving the same, as being in accordance with law and just (p. 2, Finding III).

Said account and time so employed, computed at the rate of $5 per day, to wit, 106 days, amounts to the sum of five hundred and thirty dollars ($530.00).

For these services the claimant, John T. Patterson, by his petition, filed in the Court of Claims July 12, 1892, charged $5 a day under that clause of Section 847 of the Revised Statutes of the United States, relating to the fees of commissioners, which allows:

"For hearing and deciding on criminal charges, five dollars a day for the time necessarily employed."

The Court of Claims gave judgment in his favor for $530, and the United States appealed (p. 3).

2. Brief of Argument.

The clause of Rev. Stat. §847 herein involved has been construed by this court in *United States* v. *Jones*, 134 U. S. 483. The ground upon which per diem compensation was there allowed the commissioner is clearly set forth in the following extract from the opinion, pages 486 and 487.

"The compensation of a commissioner is clearly prescribed and classified by section 847 of the Revised Statutes according to the character of the services performed. For acts purely clerical and ministerial, such as administering oaths, taking acknowledgments, taking and certifying depositions to file, or furnishing a copy of the same, specific fees are provided, and for issuing writs or warrants or other services he has the same compensation as is allowed to clerks for like services. For acts not merely clerical, but which are performed by the commissioner in

his judicial capacity, his fees are regulated on a basis of per diem compensation."

Accordingly it was held in that case that the commissioner was entitled to his per diem compensation for hearing and deciding motions upon bail and the sufficiency thereof, and also upon motions for continuance.

Under the rule thus laid down the only question open for discussion on the present record is, whether the commissioner acts in a judicial, as distinguished from a clerical, capacity, in "hearing charges made by complaining witnesses against persons charged with violations of the laws of the United States, and holding examinations of such complaining witnesses, and any other witnesses produced by them in support of their allegation, and deciding whether a warrant should not issue upon the complaint made."

If such services are performed in a clerical capacity, then the provision for per diem compensation may not be applicable. If, however, the act of so hearing and so deciding questions is of a judicial character the commissioner would be entitled to compensation on the basis of $5 per diem.

Every distinction that can be drawn between the Jones case and the present is in favor of this case. There the questions heard and decided did not affect the merits of the case, and were merely preliminary or incidental to the hearing of the charge itself. In the present case it was the very merits of the charge itself which were investigated and decided by the commissioner.

An examination of the laws of North Carolina may be important in this respect, for it has been decided by this court that in view of the provisions of Section 1014 of the Revised Statutes of the United States, requiring proceedings to be taken "agreeably to the usual mode of process

against offenders in such State," "it is proper to look at the law of the State in which the services in such case are rendered, to determine what is necessary and proper to be done, and inferentially for what services the commissioner is entitled to payment." *United States* v. *Ewing*, 140 U. S. 142, 144, citing *United States* v. *Rundlett*, 2 Curtis, 41; *United States* v. *Horton*, 2 Dill. 94. The material sections of the State law are as follows:

"CODE OF NORTH CAROLINA, Vol. 1, Sec. 1133. *Duty of magistrate on complaint being made to him of a commission of crime.*—Whenever complaint shall be made to any such magistrate that a criminal offense has been committed within this State, or without this State and within the United States, and that a person charged therewith is in this State, it shall be the duty of such magistrate to examine on oath the complainant and any witnesses who may be produced by him.

"SEC. 1134. *Duty of magistrate to issue his warrant for the arrest of the accused.*—If it shall appear from such examination that any criminal offense has been committed, the magistrate shall issue a proper warrant under his hand with or without seal, reciting the accusation, and commanding the officer, to whom it is directed, forthwith to take the person accused of having committed such an offense and to bring him before a magistrate, to be dealt with according to law."

The distinction between the judicial and ministerial duty connected with the services of holding preliminary examinations and issuing warrants is very clearly defined by Chief Justice Ruffin in the case of *Welch* v. *Scott*, decided by the Supreme Court of North Carolina, in which he said:

"A magistrate may grant a warrant *super visum*. But except in that case it is his duty, before issuing a warrant, to require evidence on oath, amounting to a direct charge, or creating a strong suspicion of guilt. * * *

But it is not necessary to set out the evidence in the warrant, even in justification of the magistrate. * * * But when the warrant purports to be for a matter within the jurisdiction of the justice, the ministerial officer is obliged to execute it, and, of course, must be justified by it. He can not inquire upon what evidence the judicial officer proceeded, or whether he committed an error or irregularity in his decision." (5 Ired. 72.)

And in another case decided in the Supreme Court of North Carolina, Judge Daniel said: "The justice is to judge and determine upon the questions of law, arising from the facts disclosed in the affidavit of the person making the application." (*State* v. *McDonald*, 3 Dev. Law, 468, 471.)

Decisions in the courts of other States are similar to those of North Carolina.

In *People* v. *Lynch*, 29 Mich. 274, the court, referring to an examination of this kind, preliminary to the issuance of a warrant, said (p. 279):

"The object of this examination is to enable the justice to determine from it whether there is sufficient ground for issuing a warrant to bring the accused before him for examination; and the object of that examination is not to determine the guilt or innocence of the accused as upon a trial, but whether there is probable cause for believing him guilty; and if the justice thinks from the evidence on the examination that there is such probable cause, he is to cause him to be committed or enter into recognizance so as to secure his presence at the Circuit Court for trial, as was done in this case; and it would be preposterous to suppose that any stronger evidence could be required for issuing the warrant to enable the justice to examine the accused, than is required on the examination itself." Accordingly, it was held (p. 280), that the magistrate would, under certain circumstances there stated, be authorized, and it would be his duty to issue a

warrant, "if he thought there was reasonable cause to believe the defendant guilty"; also, that certain evidence "having a tendency to produce in the mind of the justice the belief of the probable guilt of the prisoner, if it does produce that belief, and he issues his warrant upon it, he can not certainly be said to have issued it without jurisdiction," etc.;—thus showing the whole proceeding to be of a strictly judicial character.

To the same effect are *State* v. *Hobbs*, 39 Me. 212; *State* v. *Keyes*, 75 Wis. 288; *Bradstreet* v. *Furgeson*, 14 Wend. 181.

See also Blackstone, 4 Commentaries, 290, where the rule as to the proper proceedings to be taken by a magistrate is thus stated:

"Sir Edward Coke indeed hath laid it down that a justice of the peace can not issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found; and the contrary practice is by others held to be grounded rather upon connivance than the express rule of law; though now by long custom established. A doctrine which would in most cases give a loose to felons to escape without punishment; and therefore Sir Matthew Hale hath combatted it with invincible authority and strength of reason; maintaining, that 1. That a justice of the peace hath power to issue a warrant to apprehend a person *accused* of felony though not yet indicted; and, 2. That he may also issue a warrant to apprehend a person *suspected* of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well as to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party against whom the warrant is prayed."

This rule is also in substance the one adopted by the constitution of the United States in its fourth amendment, which provides that "No warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Who is to judge of the "probable cause" here required? Surely it can be no other than the magistrate to whom the application is made for the warrant, and, if so, that magistrate exercises judicial power, and if judicial power is exercised, his compensation for it must, under the decision in *United States* v. *Jones*, be upon the basis of $5 a day.

The same view of the powers and duties of United States commissioners was taken by Mr. Justice Field in the Circuit Court of the United States for the District of California in *United States* v. *Schumann*, 2 Abbott U. S. 523, 525, as follows:

"He is thus made a magistrate of the Government, exercising functions of the highest importance to the administration of justice. He is an examining and committing magistrate, bound to hear all complaints of the commission of any public offense against the laws of the United States in his district, to cause the offender to be arrested, to examine into the matters charged, to summon witnesses for the Government and for the accused, and to commit for trial or to discharge from arrest according as the evidence tends or fails to support the accusation. For the faithful discharge of his duty in these particulars he alone is accountable. He has no divided responsibility with any other officer of the Government, nor is he subject to any other's control."

Judge Woods, in the District Court for Indiana, after citing the *Schumann* case, as just quoted, adds:

"This view is fully sustained in the case of *United States* v. *Scroggins*, 3 Woods, 529, where it is held, in ef-

fect, that a commissioner, as an examining magistrate, has the powers, and derives them from the same source, as the chief justice or other justices or judges of the United States would have when acting in the same capacity.

"Clothed with such powers, the commissioner must in every instance determine judicially whether a charge laid before him is sufficient in form and substance to justify an arrest and investigation."

Ex parte *Perkins*, 29 Fed. Rep. 911.

True, the Circuit Court on appeal took a somewhat different view on the merits of the case, but not contravening the general principle laid down in the District Court. 29 Fed. Rep. 900.

In the case of *Harper* v. *United States*, 21 C. Cls. 56, it is stated (p. 57) that in 1866 an opinion was given on this clause by the Assistant Secretary of the Interior (the department then having supervisory power over such accounts), in which it was held that "the terms hearing and deciding embrace the commissioner's acts and rulings in the case, as well as the trial and determination of the issues of [the] fact[s] in the technical sense of those words." Also, that (p. 58) "the accounting officers appear to have followed this rule in settling such accounts until 1883, when a more rigid rule was adopted," etc.

This ruling is certainly broad enough to embrace, in principle, any hearing on the merits, even though purely preliminary to the issuance of a warrant.

It is true that it may be suggested that in the *Jones* case the allowance was for services rendered after the return of the warrant of arrest, while in the present case the fees are claimed for services performed before the issuing of the warrant, and as preliminary thereto.

This is fully answered by the opinion of Attorney General Black, given in 1858 on the question of the per diems of district attorneys. He there held that "A district at-

torney is entitled to his fee of $5 per day for the time necessarily employed in the preliminary proceedings of a criminal prosecution, both before and after the arrest." As this opinion is directly in point I beg leave here to cite it in full.

"The fee bill of 1853 allows a district attorney five dollars per day for the time necessarily employed by him in the examination, before a judge or commissioner, of a person charged with crime. (10 Stat. at Large, 162.) May he receive this per diem compensation for necessary services previous to the arrest of the accused party, or is he confined in his allowance to such days as he may have to spend in the business after the offender is brought before the magistrate?

"The answer to these questions depends upon another: What is the meaning of the phrase '*examination of a person charged with crime?*' We can find that out by looking at the course of proceedings which the law requires in the early stages of a criminal prosecution.

"When the prosecution is commenced by a public officer, he does not himself swear to the facts on which it is based, for he does not know them. He goes before the proper judicial magistrate, makes the accusation, and produces his witnesses, or a sufficient number of them, to make out a reasonable *prima facie* case. Then the warrant of arrest is issued, and the party brought up. If he can explain away what has already been sworn to, in a manner which satisfies the magistrate of his innocence, he may do so; and the prosecutor is also heard on the part of the Government to strengthen his demand for a committal. In all this there is, strictly speaking, no examination of the person charged. It is merely an inquiry into the question of his probable guilt; an investigation of the proofs, first, to see if he should be arrested, and afterwards to decide whether he ought to be committed, bailed, or discharged. The accused may give his own statement of the facts, and make that a part of the proceedings. But in modern practice this is seldom done, and the Government never has a right to demand it. It is plain to

me that *examination of the person charged* means *investigation of the case.* This being settled, why should we make any distinction between the investigation which takes place before the warrant and that which comes before the committal? They are both equally investigations of the case, and one is no more an examination of the person than the other. It follows that the district attorney is entitled to his fee of five dollars per day for the time necessarily employed in the preliminary proceedings of a criminal prosecution, both before and after the arrest."

"Of course I decide nothing but the simple question of law you submit for my consideration. I assume that the charges against the Government are in good faith for days necessarily employed, and that there is no objection to the allowance except the naked fact that the services were rendered before the accused was arrested."

9 Opinions of Attorneys General, 170, 171.

The ground here taken by Attorney General Black, that the examination of the person charged means the investigation of the case, is just as applicable to the present provision of law as it was to the one which was before Attorney General Black. Here the words of the statute are "hearing and deciding on criminal charges." This does not mean a final decision of the charge, for this can not take place until the party is indicted and put upon his trial before a jury. It refers entirely to the preliminary proceeding before the committing magistrate.

This inquiry takes place as well before the issuance of the warrant as after its return. In neither instance is there any such thing as a final and conclusive decision on the merits of the charge. In both it is an investigation of the merits of the case, and, therefore, in both instances, according to Attorney General Black's opinion, entitled to be paid for on the basis of a per diem charge.

As to the point referred to in the last page of the opinion just cited, as to whether the charges are in good faith

for services actually and necessarily rendered, it is sufficient to refer to the findings of the court, that the charges were approved by the circuit court of the district as being in accordance with law and just. The effect of such an approval was stated by this court in *United States* v. *Jones*, 134 U. S. 483, 488, as follows: "The approval of a commissioner's account by a Circuit Court of the United States, under the act of February 22, 1875, 18 Stat. 333, is *prima facie* evidence of the correctness of the items of that account; and in the absence of clear and unequivocal proof of mistake on the part of the court it should be conclusive."

The judgment of the Court of Claims should therefore be affirmed.

GEORGE A. KING,
Attorney for Appellee.

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(Appeal from the Court of Claims.)

BRIEF FOR APPELLEE.

RICHARD R. McMAHON,
WM. W. DUDLEY,
LOUIS T. MICHENER.

MITCHELL, PRINTER.

IN THE

Supreme Court of the United States.

October Term, 1893.

THE UNITED STATES, *Appellant*,
vs.
JOHN T. PATTERSON.
} No. 951.

BRIEF FOR APPELLEE.

The Code of North Carolina contains the following provisions prescribing the duties of magistrates:

"Sec. 1133. *Duty of magistrate on complaint being made to him of a commission of crime.*—Whenever complaint shall be made to any such magistrate that a criminal offense has been committed within this State, or without this State and within the United States, and that a person charged therewith is in this State, it shall be the duty of such magistrate to examine on oath the complainant and any witnesses who may be produced by him.

"Sec. 1134. *Duty of magistrate to issue his warrant for the arrest of the accused.*—If it shall appear from such examination that any criminal offense has been committed, the magistrate shall issue a proper warrant under his hand with or without seal, reciting the accusation, and commanding the officer, to whom it is directed, forthwith to take the person accused of having committed such an offense and to bring him before a magistrate, to be dealt with according to law."

In criminal law a complaint is the allegation made to a proper officer that some person, whether known or unknown, has been guilty of a designated offense, with an offer to prove the fact, and a request that the offender may be punished.

The foundation of the magistrate's jurisdiction is based

upon the complaint. His jurisdiction requires him to pass upon it, to determine its sufficiency or insufficiency. And this he can do only in a judicial capacity. He *hears* the allegation, he *examines* on oath the complainant and any witnesses produced, and from their testimony decides whether the charges made are or are not valid in law, and the evidence sufficient to justify the issuance of a warrant against the accused party. And, in so doing, he exercises judicial functions. He is the judge of the evidence. He exercises his discretion in deciding whether the facts disclosed in the complaint have legal value.

"It is a general and sound principle that whenever the law vests any person with power to do an act, and constitutes him a judge of the evidence on which the act may be done, and, at the same time, contemplates that the act is to be carried into effect through the instrumentality of agents, the person thus clothed with power is vested with discretion, and is, *quoad hoc, a judge.*

Vanderheyden *vs.* Young, 11 Johns (N.Y.), 158.

The following acts have been held to be judicial: Passing upon the sufficiency of bail; committing witnesses; granting or refusing motions for continuance; examining witnesses; committing defendants.

Chickering *vs.* Robinson, 3 Cush. (Mass), 543; Morrison *vs.* McDonald, 21 Me., 550; United States *vs.* Jones, 134 U. S., 483.

"* * * We held in United States *vs.* Jones, 134 U. S., 483, that in hearing and deciding upon criminal charges he (Commissioner) acted in a judicial capacity, and we have no doubt he is invested with discretionary power to suspend the hearing of a case where, in his judgment, a proper regard for the interests of justice requires it."

United States *vs.* Ewing, 140 U. S., 142.

A judicial act is:

"The act of a public functionary, who, being clothed by law with authority to act in the premises, and having jurisdiction of the subject-matter and the persons to be affected, *exercises his judgment and discretion*, not merely obeying a

prescribed formula which leaves him no alternative, and pronounces a decision which must be obeyed by the parties interested, or issues an order which must be carried into effcet by other officials."

Murfree's, Justice, Practice, sec. 975.

"A magistrate may grant a warrant *super visum*. But except in that case it is his duty, before issuing a warrant, to require evidence on oath, amounting to direct charge, or creating a strong suspicion of guilt. * * * But it is not necessary to set out the evidence in the warrant, even in justification of the magistrate. * * * But when the warrant purports to be for a matter within the jurisdiction of the justice, the *ministerial* officer is obliged to execute it. * * * He cannot inquire upon what evidence the *judicial* officer proceeded, or whether he committed an error or irregularity in his decision."

Welch *vs.* Scott, 5 *Ired.*, 72.

"The justice is to *judge* and determine upon the questions of law arising from the facts disclosed in the affidavit of the person making the application."

State *vs.* McDonald, 3 Dev. Law., 468.

Upon the question whether a District Attorney was entitled to a fee of five dollars a day for examinations before a Commissioner of persons charged with crime, previous to the warrant of arrest, Attorney General Black said:

"It is plain to me that examination of the person charged means investigation of the case. This being settled, why should we make any distinction between the investigation *before the warrant* and that which comes before the committal? They are both equally investigations of the case, and one is *no more an examination of the person than the other*."

9 Opins. Att. Gen., 171.

In what capacity, then, does the Commissioner act in conducting the examination and deciding whether, from the testimony adduced, a warrant should issue? Surely not in a clerical capacity. What, therefore, is his compensation? The Supreme Court has determined and fixed it in the Jones case.

"For acts *not merely clerical*, but which are performed by the Commissioner in his judicial capacity, his fees are regulated on a basis of per diem compensation."

United States *vs.* Jones, 134 U. S., 483.

In support of their contention the counsel for the appellants cite the case of Ives *vs.* United States (24 C. Cls., 363) as clearly settling the question in issue. The Ives case was decided April 22, 1889; the Jones case, March 24, 1890.

There was no appeal in the Ives case, as the Government was satisfied with the judgment, and the plaintiff couldn't appeal, as the amount involved was insufficient under the law.

The counsel then turns to the Jones case and argues that the words used by the Supreme Court conclusively prove that the Court had in mind only proceedings after the arrest, and which *impliedly* declare that it is to *such proceedings* that the words "to hear and decide" can apply.

The Supreme Court passed upon the questions before them and upon no others. There were two questions only involved in the Jones case, viz: (1) whether a decision upon a motion for bail and the sufficiency thereof, and (2) whether a decision upon a motion for a continuance were judicial acts in the hearing and deciding on criminal charges within the meaning of section 847, providing a per diem compensation.

The contention of the appellants in this case was that the rulings of the accounting officers in denying per diems in such cases should be sustained, as the words of the statute "hearing and deciding on criminal charges" did not include taking bail nor continuing cases.

The Supreme Court overruled the objection and held that—

"The decision, upon a motion for bail and the sufficiency thereof, is a judicial determination of *the very matter* which the statutes authorize and require him to 'hear and decide,' to wit, whether a party arrested for a crime * * * when brought before him for examination, shall be discharged or committed on bail for trial, and in default thereof imprisoned."

And—

"With respect to motions for continuance, the granting or refusal of them is *unquestionably* a necessary *incident to and a part of* the hearing and determining of criminal charges. * * *."

And, to emphasize its decision, the Supreme Court held that—

"For acts not merely clerical, but which are performed by the Commissioner in his judicial capacity, his fees are regulated on a basis of per diem compensation."

The counsel for the appellant insist that there is nothing in the Code of North Carolina which has any application to the question under discussion, and that only in the *forms of procedure* can State laws affect the acts of United States Commissioners, and upon the question of fees and emoluments they can have no application.

In the case of United States *vs.* Ewing, the Supreme Court said: "It is proper to look at the law of the State in which the services in such cases are rendered, to determine what is necessary and proper to be done, *and inferentially for what services the Commissioner is entitled to payment.*"

In the same case, the Court held that a charge for writing out testimony was clearly allowable not only because it was required by a rule of court, but also because the State code *required the testimony before the committing magistrate to be reduced to writing.* United States *vs.* Ewing, 140 U. S., 142.

In the Barber case the Supreme Court said: "In the case of United States *vs.* Ewing, we held that *where the local practice required a magistrate to reduce the examination of the complaining witnesses to writing* an allowance for drawing the complaint, as for taking depositions to file, *was a proper charge* under Rev. Stat., sec. 847," thus basing the legality *and allowance* of the charge upon the requirement of the local practice.

This surely does away with the contention of the appellant's counsel that "only in the *forms* of procedure can State laws affect the acts of United States Commissioners," and that